High School Exit Tests and the Constitution:

Debra P. v. Turlington

Debra P. v. Turlington[1] was the first case[2] to consider the legal merits of a statewide minimum competency testing program[3] for public school pupils. The named plaintiffs[4] in the class action were Hillsborough County, Florida students who had failed the state's functional literacy examination (FLE) and who consequently did not qualify for a standard high school diploma even though they had completed twelve grades of school.[5] The suit challenged the FLE, its administration, and its statutory underpinnings as violations of the equal protection and due process

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1. 474 F. Supp. 244 (M.D. Fla. 1979).

2. The Florida competency testing program was challenged procedurally before *Debra P. See* Florida State Bd. of Educ. v. Brady, ____ Fla. App. ____, 368 So. 2d 661 (1979). North Carolina's competency program was challenged but the case was dismissed on a standing question. Green v. Hunt, No. 78-539-CIV-5 (E.D.N.C. April 3, 1979).

3. For background on minimum competency testing (MCT), *see* R. BOSSONE, MINIMUM COMPETENCIES: A NATIONAL SURVEY (1978); R. FRAHM & J. COVINGTON, WHAT'S HAPPENING IN MINIMUM COMPETENCY TESTING (1979); S. NEILL, THE COMPETENCY MOVEMENT: PROBLEMS AND SOLUTIONS (report to the American Association of School Administrators) (1978); AMERICAN FRIENDS SERVICE COMMITTEE, A CITIZEN'S INTRODUCTION TO MINIMUM COMPETENCY TESTING PROGRAMS (1978) [hereinafter cited as CITIZEN'S INTRODUCTION]; *Symposium, The Minimum Competency Testing Movement* 59 PHI DELTA KAPPAN 585-625 (1978); *Symposium, The Wingspread Papers: A Report on the Minimum Competency Movement*, in NATIONAL ELEMENTARY PRINCIPAL, Jan. 1979, at 12-40. For background on the Florida MCT program, *see* FLORIDA TEACHING PROFESSION - NATIONAL EDUCATION ASSOCIATION PANEL, THE FLORIDA ACCOUNTABILITY PROGRAM: AN EVALUATION OF ITS EDUCATIONAL SOUNDNESS AND IMPLEMENTATION (NEA REPORT) (1978) (*summarized in* National Education Association, *Impact of Minimum Competency Testing in Florida*, TODAY'S EDUCATION, Sept.-Oct. 1978, at 30; *see also* Fisher, *Florida's Approach to Competency Testing*, 59 PHI DELTA KAPPAN 599 (1978); Glass, *Minimum Competence and Incompetence in Florida*, 59 PHI DELTA KAPPAN 602 (1978); Turlington, *Good News from Florida: Our Minimum Competency Program is Working*, 60 PHI DELTA KAPPAN 649 (1979). For the legal implications of MCT *see* Clague, *Competency Testing and Potential Constitutional Challenges of "Everystudent"*, 28 CATH. U.L. REV. 469 (1979); Lewis, *Certifying Functional Literacy: Competency Testing and Implications for Due Process and Equal Education Opportunity*, 8 J.L. & EDUC. 145 (1979); McClung, *Competency Testing Programs: Legal and Educational Issues*, 47 FORDHAM L. REV. 651 (1979); Tractenberg, *The Legal Implications of Statewide Pupil Performance Standards* (1977) (unpublished paper available in microfiche from Education Resources Information Center); Note, *Implications of Minimum Competency Legislation: A Legal Duty of Care?* 10 PAC. L.J. 947 (1979) [hereinafter cited as *Legal Duty*]. For background on testing generally, *see* E. BURNS, THE DEVELOPMENT, USE, AND ABUSE OF EDUCATIONAL TESTS (1979); THE MYTH OF MEASURABILITY (P. Houts ed. 1977). The focus of this Comment is on MCT programs that make passing a competency test a high school graduation requirement.

4. Three classes of plaintiffs were certified:

Class A are all present and future twelfth grade public school students in the State of Florida who have failed or who hereafter fail the SSAT [State Student Assessment Test hereinafter referred to as the functional literacy examination (FLE) II].

Class B are all present and future twelfth grade black public school students in the State of Florida who have failed or who hereafter fail the SSAT II.

Class C are all present and future twelfth grade black public school students in Hillsborough County, Florida who have failed or who hereafter fail the SSAT II.

The State Commissioner of Education, Ralph D. Turlington, the state and county school boards, and state and local political and educational officials were named as defendants.
474 F. Supp. at 246.

5. FLA. STAT. ANN. § 232.246, *as amended by* 1979 Fla. Laws ch. 79-74 (West) provides:

clauses of the fourteenth amendment,[6] Title VI of the Civil Rights Act of 1964,[7] and the Equal Educational Opportunity Act.[8] The federal district court granted the plaintiffs' injunctive relief and held that Florida could not deny diplomas on the basis of FLE results until the 1982-83 academic year.[9] The case is significant because statewide minimum competency testing programs similar to Florida's have been adopted by a number of other states[10] and many of the issues raised in *Debra P.* are relevant to these other programs.

This Comment provides a brief overview of the minimum competency movement and the controversy it has created. The Comment then critically examines the *Debra P.* opinion. Section III suggests an alternative analytical approach. The concluding section discusses the implications of *Debra P.*

I. *Debra P. v. Turlington*

A. *Background of Minimum Competency Testing (MCT)*

MCT Statutes have been enacted in state after state in response to widespread discontent with the public schools and distressing evidence of

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(1) Beginning with the 1978-79 school year, each district school board shall establish standards for graduation from its schools which shall include as a minimum:

(a) Mastery of the minimum performance standards in reading, writing and mathematics for the 11th grade, established pursuant to §§ 229.565 and 229.57, determined in the manner prescribed after a public hearing and consideration by the state board;

(b) Demonstrated ability to successfully apply basic skills to everyday life situations as measured by a functional literacy examination developed and administered in a manner prescribed after a public hearing and consideration by the state board; and

(c) Completion of a minimum number of academic credits, and all other applicable requirements prescribed by the district school board pursuant to § 232.245. . . .

(3) A student who meets all requirements prescribed in subsection (1) shall be awarded a standard diploma in a form prescribed by the state board; provided that a school board may, in lieu of the standard diploma, award differentiated diplomas to those exceeding the prescribed minimums. A student who completes the minimum number of credits and other requirements prescribed by paragraph (1) (c), but is unable to meet the standards of paragraph (1) (a) or paragraph (1) (b), shall be awarded a certificate of completion in a form prescribed by the state board. However, any student who is otherwise entitled to a certificate of completion may, in the alternative, elect to remain in the secondary school on either a full-time or part-time basis for up to 1 additional year and receive special instruction designed to remediate his identified deficiencies.

6. U.S. CONST. amend. XIV, § 1: "No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

7. 42 U.S.C. § 2000d (1976).

8. 20 U.S.C. § 1703 (1976).

9. 474 F. Supp. at 269.

10. For a state by state breakdown of MCT and brief descriptions of the particular programs, *see* NATIONAL CENTER FOR EDUCATIONAL STATISTICS (NCES), THE CONDITION OF EDUCATION: STATISTICAL REPORT 68, 69 (1979); Pipho, *State Activity in Minimum Competency Testing*, 59 PHI DELTA KAPPAN 585, 587-88 (1978). For bibliography and a more extensive state by state listing, *see* R. Bossone, *supra* note 3, at 108-18 (1978). The enacted MCT programs, like the Florida program, have been subject to a considerable amount of legislative tinkering, and other states are considering MCT proposals.

poor academic performance.[11] The American Friends Service Committee has expressed the concerns of these groups:

> Many *parents* are disturbed when they find their children cannot read, write, or compute at a level the parents think is necessary.
> Many *educators* are concerned because high school students' scores on standardized tests such as the Scholastic Aptitude Test are declining.
> Many *college instructors* are upset when they find some students can't write a coherent paragraph.[12]
> Many *employers* are angry when young job applicants can't fill out an application, follow simple written directions, or can't read well enough to perform even simple job tasks.[13]

It should be added that many *students*, too, are dissatisfied with the quality of their schooling.[14]

Declining college admissions test scores,[15] grade inflation,[16] educational malpractice suits,[17] and breakdowns in school discipline have been well publicized and have, in turn, spurred the development of competency programs.

Minimum competency legislation mandates a quantifiable minimum competence. To be promoted or to graduate, the student must

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11. The most frequently cited evidence of educational decline is the steady dip in Scholastic Aptitude Test (SAT) scores since the early 1960's. *See* COLLEGE ENTRANCE EXAMINATION BOARD (CEEB), ON FURTHER EXAMINATION, REPORT OF THE ADVISORY PANEL ON THE SCHOLASTIC APTITUDE TEST SCORE DECLINE (1977). The panel's findings were not conclusive, but demographic changes in the test taking population, *e.g.*, a higher percentage of minority and low income test takers, were believed to account for two-thirds to three-fourths of the overall decline. The findings are summarized in Cawelti, *National Competency Testing: A Bogus Solution*, 59 PHI DELTA KAPPAN 619, 619-20 (1978). *But see* P. COPPERMAN, THE LITERACY HOAX 40 (1978) (demographic shifts between 1952 and 1963, a period of rising test scores, were greater than those between 1963 and 1977).

12. *E.g.*, Ohio State University (OSU) President Harold Enarson supports competency testing because OSU now must operate an expensive remedial program in English (and math) for incoming freshmen who are not prepared for college level subjects. Enarson's views are reported in OSU Lantern, Feb. 7, 1980, at 1, col. 1. As president of an open admissions university, Enarson's position is understandable. It is, however, simplistic to think that the 20-25 percent of incoming OSU freshmen who must take remedial English would not pass a high school competency test. The politics of competency testing militate against withholding diplomas from too many students. *See* Bickell, *Seven Key Notes on Minimum Competency Testing*, 59 PHI DELTA KAPPAN 589 (1978). Moreover, the OSU English department found that placement of students in remedial classes solely on the basis of scores on the American College Test (ACT) resulted in an erroneous placement rate of about 30 percent. *See* GARNES, ET AL, REPORT OF THE WRITING WORKSHOP: BASIC WRITING AT THE OHIO STATE UNIVERSITY 9, 190 (1979).

13. CITIZEN'S INTRODUCTION, *supra* note 3, at 2 (emphasis in original).

14. *See, e.g.*, P. COPPERMAN, *supra* note 11, at 222-249 *passim* (interviews with students reflecting concerns about the general lack of educational quality).

15. *See supra* note 11.

16. For a report on grade inflation, *see* Bromley, Crow & Gibson, *Grade Inflation: Trends, Causes, and Implications*, 59 PHI DELTA KAPPAN 694 (1978).

17. *See, e.g.*, Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d. 814, 131 Cal. Reptr. 854 (Ct. App. 1976); Hoffman v. Board of Educ., 49 N.Y.2d 121, 424 N.Y.S.2d 376 (1979); Donahue v. Copiaque Union Free School Dist., 64 A.D.2d. 29, 407 N.Y.S.2d. 874 (1978); Doe v. Board of Educ., 48 U.S.L.W. 2077 (Md. Cir. Ct. 1979). These cases found no cause of action for educational malpractice. *But see* the discussion in Tractenberg, *supra* note 3, at 9-11, which considers standards such as those imposed by MCT programs in the educational malpractice context. *See also* Lewis, *supra* note 3, at 182; McClung, *supra* note 3, at 661; *Legal Duty*, *supra* note 3.

demonstrate that he or she is at least minimally qualified in the basics of reading, writing, and numeracy. Typically, this demonstrable minimum is to be determined by the student's score on a standardized objective test.[18] While the laws and programs vary considerably throughout the nation,[19] the common goal in every program is that students actually possess a measured minimum academic competence, or, as it is often phrased, that students upon graduation are "functionally literate."

While no one in education contends that students should not be competent upon graduation or that present educational practices cannot be improved, many question whether statewide (or national)[20] MCT can solve the problem of chronic underachievement in the nation's classrooms. Consequently, MCT has become one of the significant controversies in contemporary American education.

Proponents of MCT assert that the programs are necessary for the following reasons: (1) an MCT requirement restores meaning to a high school diploma; present diplomas represent little more than "seat-time;"[21] (2) MCT programs set explicit standards,[22] which are needed to combat social promotions[23] and functionally illiterate graduates; (3) minimum standards counterbalance the relaxed academic environment created by curricular and instructional frills and innovations;[24] (4) MCT diagnoses

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18. Some competency programs, generally those developed at the local level, use methods of evaluation broader than standardized testing. These other measures may include writing paragraphs or oral presentations. *See, e.g.*, Henderson, *Gary, Indiana: High School Diplomas with Meaning*, 59 PHI DELTA KAPPAN 613 (1978).

19. There are three major points of distinction in the various programs. The first is whether the test measures basic skills (school skills) or adult life (functional literacy) skills. Florida's program includes both elements. *See* note 5 *supra*. The second difference is the administrative level at which the competency test is developed and administered. Florida has a single statewide program. California, on the other hand, empowers local districts to implement their own programs. *See* CAL. EDUC. CODE §§ 51215, 51217 (West 1978 and Supp. 1979). The most significant distinction, however, is whether passing the test is to be a graduation requirement. The majority of the states that have adopted competency testing have linked the test to the diploma. *See* NCES, *supra* note 10 at 68; Pipho, *supra* note 10.

20. *See* Cawelti, *supra* note 11. Rep. Ronald Mottl, Ohio, has proposed a national testing program. H.R. 9574, 95th Cong., 1st Sess. (1977). The U.S. Department of Health, Education and Welfare (HEW), however, took a cautious position on statewide MCT in a policy draft. The NEA REPORT, *supra* note 3, at 8, quoted this language from the HEW draft: "The late imposition of a requirement for graduation [of] passing a competency test limits a student's opportunity to fully participate in the education process, and in Society, because (s)he does not have sufficient time to meet the requirement."

Secretary of Education Hufstedler is "suspicious" of tests, particularly if "the youngsters who were given the test were not given the education to pass them." N.Y. Times, Feb. 10, 1980, at 19. On another occasion, Secretary Hufstedler stated that as a result of testing "[k]ids ended up with labels that were in many respects almost as destructive as tattooing numbers on prisoners." Columbus Dispatch, Jan. 16, 1980, at A-12, Col. 1. For a summary of federal involvement in testing, *see* Shoemaker, *The Federal Approach to Testing*, 58 EDUCATIONAL HORIZONS 20-25 (Fall 1979).

21. *See* Fisher, *supra* note 3, at 599, 601.

22. *See, e.g.*, Florida's standards, set forth in note 44 *infra*.

23. Social promotion is the practice of advancing a pupil from grade to grade automatically whether or not the pupil has achieved passing marks.

24. "In part the minimum competency testing movement reflects the back-to-basics movement, one aspect of a backlash against . . . the 'funsie-wunsie open education' philosophy of the 1960's." Haney and Madaus, *Symposium: Wingspread Papers*, NATIONAL ELEMENTARY PRINCIPAL, Jan. 1979,

student weaknesses and can indicate what needs to be stressed in the classroom; (5) MCT programs ensure that minority and poor students, who have been "passed through" the system for years, attain an acceptable minimum level of proficiency before graduation; (6) linking graduation to a passing score on the competency test provides a direct incentive for students to learn;[25] (7) MCT gives legislators and the public a standard of accountability by which the efficacy of school expenditures and the efficiency of school personnel can be assessed;[26] and (8) MCT can improve the somewhat tarnished image of public education and thereby generate citizen support for the schools.[27]

Opponents of MCT argue that the testing programs are likely to create more problems than they solve.[28] Their specific objections include the following: (1) MCT is an unsound psychometric practice in that it bases a profoundly important decision—whether to award or withhold a diploma—on a single variable;[29] (2) some MCT programs have been enacted so hastily that students have not had time to be taught or have not been taught adequately the skills needed to pass them;[30] (3) cut-scores are determined by political rather than psychometric criteria;[31] (4) MCT narrows the curriculum because teachers will "teach the test" to the

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at 15, 16. The fact that most schools were immune to this "funsie-wunsie philosophy" diminishes the force of the argument. *See, e.g.*, Gross, *The Status of the Social Studies in the Public Schools of the United States: Facts and Impressions of a National Survey* SOCIAL EDUCATION *March 1977, 194* (new social studies curricula seldom implemented at classroom level).

25. *See* Fisher, *supra* note 3, at 601; Turlington, *supra* note 3, at 650.

26. *See* Baratz *in Symposium*: *Wingspread Papers*, NATIONAL ELEMENTARY PRINCIPAL, Jan. 1979, 20, 21-22.

27. Turlington, *supra* note 3, at 649-50.

28. The National Academy of Education Committee on Testing and Basic Skills (NAEd.) stated: "The NAEd Panel believes that any setting of statewide minimum competency standards for awarding the high school diploma . . . is basically unworkable, exceeds the present measurement arts of the teaching profession, and will create more social problems than it can conceivably solve." NATIONAL ACADEMY OF EDUCATION COMMITTEE ON TESTING AND BASIC SKILLS, REPORT TO THE ASSISTANT SECRETARY FOR EDUCATION: IMPROVING EDUCATIONAL ACHIEVEMENT 9 (1978).

29. *See* AMERICAN PSYCHOLOGICAL ASSOCIATION (APA), STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTS AND MANUALS (1974). Test use standards include the following:

> A test user should consider more than one variable for assessment and the assessment of any given variable by more than one method.
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> Comment: For most purposes, the evaluation of a person requires description that is both broad and precise; a single assessment or assessment procedure rarely provides all relevant facets of a description. . . .
>
> Test users should also consider more than one method of assessment. Even a test yielding generally valid scores may in an individual case be susceptible to idiosyncratic errors of interpretation, and a pattern of confirming or modifying assessments may be useful. Confidence in inferences drawn from assessments may be increased by varying the sources and increasing the amount of information on which the inferences are made. In addition to tests, one might consider ratings, references, observations of actual performance, etc.

Id. at 61-62. *Accord*, NEA REPORT, *supra* note 3, at 8 ("The accepted educational practice when making important educational decisions about a child is to obtain and consider evidence from several sources, including grades given by teachers who have had many hours of contact with the student.").

30. *See* text accompanying notes 110-13 *infra*.

31. *See* Glass, *supra* note 3; Bickell, *Seven Key Notes on Minimum Competency Testing*, 59 PHI DELTA KAPPAN 589, 591 (1978) ("How many students can your school or state *afford*—both economically and politically—to remediate, or not promote, or not graduate if remediation fails?").

exclusion of other subject matter;[32] (5) the MCT achievement "floor" tends to become a "ceiling" and the pursuit of educational excellence is sidetracked; (6) MCT represents a form of "false-advertising" because so-called functional, "real-world" skills cannot adequately be evaluated by a paper and pencil test;[33] (7) MCT is expensive because of test development costs, test administration costs, and costs associated with remediation; (8) MCT reduces the holding-power of the schools and results in higher dropout rates;[34] (9) MCT singles out the individual student to bear the blame for failure because "legislators, school board members, administrators, or teachers are not subject to comparable penalties for their failure to create necessary programs, provide quality instruction, or appropriate the money that will help students learn the basic skills;"[35] (10) MCT imposes a disproportionate burden on minority youngsters who fail the tests with much greater frequency than white middle-class pupils;[36] and (11) MCT is a simplistic response to the longstanding problem of underachievement, a problem that is as old as American public schooling.[37]

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32. *See* NEA REPORT, *supra* note 3, at 8-9 (emphasis on elementary reading and arithmetic at expense of high school science, history, and literature).

33. *See* Nathan & Jennings, *Educational Bait-and-Switch*, 59 PHI DELTA KAPPAN 621 (1978).

34. Willard Wirtz, chairman of the CEEB panel, made this comment:

> There is reason to doubt whether the averages on many of the standardized tests would have gone down significantly over the past ten years if it hadn't been for the effects, both direct and indirect, of the increased high-school retention rate that came about in the United States during the 1960's. It is reasonable to accept increased testing as part of the course of action that is necessary to shore up minimum competencies. But unless a reasonable affirmative-action program is instituted, the consequences of increased competency testing will certainly be an upturn in what we have called the "dropout" rate. The test-score averages of those staying in school will go up, but we won't know from these figures what has happened to the education of youth as a whole.

Wirtz, *What Shall We Do About Declining Test Scores*, *in* 1978 CONFERENCE SERIES, AMERICAN ASSOCIATION FOR HIGHER EDUCATION, at 4. One superintendant was quoted on the matter of dropouts as saying: "Students who drop out because of the tests probably would have dropped out anyway, because they are students who are unable or not interested in getting the diploma." The statement appears in Til, *One Way of Looking At It*, 59 PHI DELTA KAPPAN 556 (1978). Another explanation for why students who fail the tests drop out was advanced by Milton Morris, an NAACP attorney and counsel in *Debra P.*: "Kids would be better off dropping out of school at the end of their senior year than being stigmatized by a Certificate of Attendance as certified dummies." Quoted in McClung, *supra* note 3, at 660 n.45.

35. CITIZENS' INTRODUCTION, *supra* note 3, at 8.

36. *Id.* at 6-7.

37. *See, e.g.*, R. HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE (1964): "The history of our educational writing poses a formidable challenge to those modern educational critics who yield too readily to nostalgia for good old days that apparently were never too good." *Id.* at 301. Hofstadter supplies examples beginning with Horace Mann, who in the 1840's wrote that "the schools have retrograded within the last generation or half generation in regard to orthography." *Id.* at 302. An 1870 critic declared that "[h]undreds of our American schools are little less than undisciplined juvenile mobs." *Id.* at 303. The most contemporary sounding complaint was culled from a 1902 New York Sun editorial:

> When we were boys, boys had to do a little work in school. They were not coaxed; they were hammered. Spelling, writing, and arithmetic were not electives, and you had to learn. In these more fortunate times, elementary education has become in many places a vaudeville show. The child must be kept amused, and learns what he pleases. Many sage teachers scorn the old-fashioned rudiments, and it seems to be regarded as between a misfortune and a crime for a child to learn to read.

Id. The modern criticism of school outcomes can be traced back at least to the publication of R.

Educational policy makers must consider and resolve these issues. This educational debate, however, takes on a legal dimension because MCT programs that predicate high school graduation on passing a test threaten important personal interests. The penalty imposed on those who fail to measure up is denial of a high school diploma, the universal credential for employment or further educational opportunity.

B. *Facts and Holding of* Debra P. v. Turlington

1. *Facts*

In 1976, Florida was one of the first states to enact a statewide educational accountability program with minimum performance standards.[38] A 1978 amendment mandated that students who demonstrated their knowledge of basic skills and passed the competency test developed by the State Department of Education would receive a standard diploma while those who failed the FLE would only be entitled to a nebulous "certificate of completion."[39] A certificate of completion would not be considered a diploma for purposes of employment with the state or for admission to state-supported universities.[40]

The statute called for a relatively brief planning and preimplementation period. Consequently, the Florida Department of Education was subject to enormous time pressures to develop a coherent program that would be in place by the 1978–79 school year.[41] Moreover, until the 1976 Accountability Act was passed, there had been little or no centralized control of Florida's public schools.[42] Local boards operated autonomously and as a result curricular offerings varied markedly from district to district.[43] Nevertheless, the state school administrators were able to define curricular objectives and contract with test publishers who developed test instruments based on these objectives.[44] The process was com-

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FLESCH, WHY JOHNNY CAN'T READ (1955). Thus, there is some basis for the conclusion that "[m]inimum competency testing is simply the latest verse in [an] old refrain." Haney & Madaus, *supra* note 24, at 15.

The academic value of the degrees granted by American schools has also been subject to criticism through the years. The criticism dates back to the colonial period. One colonist made this complaint in 1773: "[I]gnorance wanders unmolested at our colleges, examinations are dwindled to meer [sic] form and ceremony, and after four years dozing there, no one is ever refused the honours of a degree, on account of dulness [sic] and insufficiency." D. BOORSTIN, THE AMERICANS: THE COLONIAL EXPERIENCE 182 (1958).

38. FLA. STAT. ANN §229.55-58 (West 1977 & West Supp. 1980).

39. *See* note 5 *supra*. (The 1979 amendment added the optional thirteenth year program).

40. 474 F. Supp. at 249.

41. *Id.* at 257.

42. *Id.* at 264.

43. *Id.*

44. *Id.* at 259 n.22. The objectives were:

(a) Communications.

The student will, in a real world situation, determine the main idea inferred from a selection.

The student will, in a real world situation, find who, what, where, which, and how information in a selection.

pleted in time to meet the legislative requirements. The tests were then preliminarily screened in a few local districts before being administered statewide.[45] While the results of the pilot tests were alarming, the results of the initial statewide administration in October, 1977, were disastrous and caused national notoriety.[46] Thirty-six percent of the 115,000 students who took the FLE failed both the communications and mathematics sections with a failure rate of 78 percent on both sections for blacks and 25 percent for whites.[47] The second adminstration of the test brought similar racial results as 74 percent of the black students failed one or both areas as opposed to 25 percent of the white students.[48] After a third attempt at the test some 20 percent of the black twelfth-graders had not passed while the

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The student will, in a real world situation, determine the inferred cause and effect of an action.

The student will, in a real world situation, distinguish between facts and opinions.

The student will, in a real world situation, identify an unstated opinion.

The student will, in a real world situation, identify the appropriate source to obtain information on a topic.

The student will, in a real world situation, use an index to identify the location of information requiring the use of cross-references.

The student will use highway and city maps.

The student will include the necessary information when writing letters to supply or request information.

The student will complete a check and its stub accurately.

The student will accurately complete forms used to apply for a driver's license, employment, entrance to a school or training program, insurance, and credit.

(b) Mathematics

The student will determine the elapsed time between two (2) events stated in seconds, minutes, hours, days, weeks, months, or years.

The student will determine equivalent amounts of up to one hundred dollars ($100.00) using coins and paper currency.

The student will determine the solution to real world problems involving one (1) or two (2) distinct whole number operations.

The student will determine the solution to real world problems involving decimal fractions or percents and one (1) or two (2) distinct operations.

The student will determine the solution to real world problems involving comparison shopping.

The student will determine the solution to real world problems involving rate of interest and the estimation of the amount of simple interest.

The student will determine the solution to real world problems involving purchases and a rate of sales tax.

The student will determine the solution to real world problems involving purchases and a rate of discount given in fraction or percent form.

The student will solve a problem related to length, width, or height using metric or customary units up to kilometers and miles, conversion within the system.

The student will solve a problem involving the area of a rectangular region using metric or customary units.

The student will solve a problem involving capacity using units given in a table (milliliters, liters, teaspoons, cups, pints, quarts, gallons), conversion within the system.

The student will solve a problem involving weight using units given in a table (milligrams, grams, kilograms, metric tons, ounces, pounds, tons), conversion within the system.

The student will read and determine relationships described by line graphs, circle graphs, and tables.

45. *Id.* at 258. *See also* Fisher, *supra* note 3, at 600.

46. TIME Dec. 12, 1977, at 22 trumpeted "Florida Flunks." The story told of worried seniors who scurried over the border to enroll in Georgia high schools. *Id.*

47. 474 F. Supp. at 248.

48. *Id.* at 248.

percentage of whites who failed it diminished to less than 2 percent.[49] In the wake of these test results, suit was filed against state and local education officials.

2. *Plaintiffs' Claims*

Plaintiffs advanced three specific claims for relief. The first claim alleged equal protection violations based on Florida's prior history of purposeful racial discrimination, the natural, probable, and foreseeable discriminatory effect of the statutory scheme, the invalidity, unreliability, and racial bias of the test instrument, and the exemption given to Florida's 95 percent white enrollment private schools from the functional literacy examination requirement.[50]

The second claim alleged violations of due process. The primary allegations in that claim were that the testing program was initiated without adequate pretest notice and that the defendants had not ensured that "there [was] a match between institution and curriculum . . . in all the areas covered by the test."[51]

The final claim was directed at the remedial programs mandated for students who failed the FLE. Plaintiffs contended that these remedial clauses had a resegregative effect because disproportionately high numbers of black pupils were enrolled in these classes.[52]

3. *Holding*

The court held that the FLE, as administered, and its attendant diploma sanction violated the equal protection clause because "past purposeful discrimination . . . is perpetuated by the test and the diploma sanction regardless of its neutrality."[53] Further, the court stated that "punishing the victims of past discrimination for deficits created by an inferior educational environment neither constitutes a remedy nor creates better educational opportunities."[54]

The court also found that inadequate pretest notice constituted a violation of the due process clause in that the implementation schedule was "fundamentally unfair."[55] Notwithstanding the court's reluctance "to interfere in the operations of the Florida public schools,"[56] it rebuffed the defendants' argument that the momentum and credibility of Florida public education would be compromised if the test and the testing schedule were invalidated or delayed.[57]

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49. *Id.* at 249.
50. Complaint at 13-15, Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979).
51. *Id.* at 15-16.
52. *Id.* at 16-17.
53. 474 F. Supp. at 254-55.
54. *Id.* at 257.
55. *Id.* at 267.
56. *Id.*
57. *Id.*

The court found no violation in the assignment of students to disproportionately black remedial classes because "the testing program along with the compensatory education classes, . . . will remedy the present effects of past discrimination . . . ."[58] This approval, however, was conditioned on the continued development of an effective remedial program.[59]

The court enjoined the state from requiring a passing score on the FLE as a graduation requirement until 1982-83.[60] The rationale for this date was that Florida had operated an essentially nonsegregated school system since 1971 and as a result the class of 1983 would not be tainted by prior segregated schooling.[61] The court attributed considerable significance to the fact that plaintiffs had attended segregated schools for the critical first four years of their educational careers.[62] The four year delay would also permit the state to remedy the due process violation caused by the inadequate phase-in schedule.

The court specifically did not enjoin the state from using the FLE for remedial and diagnostic purposes.[63] Nor did it find the private school exemption to be unconstitutional.[64]

II. CRITICAL ANALYSIS OF *Debra P.*

A. *Due Process*

1. *The Interests Imperiled*

The interests imperiled by Florida's statewide minimum competency testing program are substantial. A high school diploma has become the

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58. *Id.* at 268. This Comment does not further discuss the court's ruling on the effect of the disproportionately black remedial classes. The fact that students were moving through these classes and that the classes met for only part of the school day governed the court's finding. These factors parallel federal regulations on ability grouping. 45 C.F.R. § 185.43(c) (2)-(3) (1979).

59. 474 F. Supp. at 268.

60. *Id.* at 269.

61. *Id.* at 251-52, 269.

62. *Id.* at 251-52. *See also* FLA. STATS. ANN § 230.2311(1) *as amended by* 1979 Fla. Laws ch. 79-74:

> (1) The Legislature recognizes that the early years of a pupil's education are crucial to his future and that mastery of the basic skills of communication and computation is essential to the future educational and personal success of an individual. The first priority of the public schools of Florida shall be to assure that all Floridians, to the extent their individual physical, mental, and emotional capacities permit, shall achieve mastery of the basic skills. The term "basic skills," for the purposes of this section, means reading, writing, and arithmetic. Early childhood and basic skills development programs shall be made available by the school districts to all students, *especially those enrolled in kindergarten and grades 1 through 3*, and shall provide effective, meaningful, and relevant educational experiences designed to give students at least the minimum skills necessary to function and survive in today's society. (emphasis added).

63. 274 F. Supp. at 269.

64. *Id.* at 262-63. The court cited San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1972) (wealth not a suspect classification), and Ambach v. Norwick, 441 U.S. 68 (1979) (rational for state to concentrate efforts on the schools it controls directly).

basic credential for employment and higher educational opportunities.[65] Denial of a standard diploma therefore has a devastating effect on future prospects in an increasingly credential-conscious society. Moreover, a liberty interest in personal reputation is threatened by the testing program because the stigmatizing epithet "functional illiterate" attaches to students who fail the FLE.[66] This stigmatization is particularly severe because it is applied to young people at the threshold of adulthood and must be borne throughout their adult lives.

a. *Property Interest in a High School Diploma*

The court found that the plaintiffs had a "property right in graduation from high school with a standard diploma."[67] It based this finding on *Goss v. Lopez*,[68] which held that students' "legitimate claims of entitlement to a public education"[69] could not be denied for a disciplinary violation without procedural due process. If the right to a public education exists by virtue of the state's operating schools and compelling attendance, the right to a diploma, the tangible benefit of education, is a logical corollary.[70]

While the high school diploma in recent years has been maligned for meaning less in terms of achievement than it has ever meant before, it has taken on an even greater significance in terms of subsequent educational and employment opportunities.[71] In years past, employers and even higher educational institutions would overlook the absence of a high school diploma if the applicant could otherwise demonstrate his or her ability. Entrance to jobs and post-secondary schooling today, however, requires the diploma even if the diploma bears little or no relationship to the actual job or course of study.[72]

Moreover, as one commentator has noted, "the state's massive restraint on a child's liberty, by compelling attendance upon school for six hours a day, 180 days a year, for up to ten years can only be justified if some minimal benefit is guaranteed to flow therefrom."[73] The duty to attend

65. *See* I. BERG, EDUCATION AND JOBS: THE GREAT TRAINING ROBBERY (1970); D. HAPGOOD, DIPLOMAISM (1971).

66. *See* text accompanying note 76 *infra*.

67. 474 F. Supp. at 266.

68. 419 U.S. 565 (1975).

69. *Id.* at 573.

70. If, by reason of the socio-economic factors of our times an individual may not be deprived of an equal opportunity to obtain whatever education may be provided by a State . . ., then *a fortiori* one may not be arbitrarily deprived of whatever certificate, diploma or other evidence of that education may be provided. Goldwyn v. Allen, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 905 (Sup. Ct. 1967).

71. I. BERG, *supra* note 65, at 185 ("Educational credentials have become the new property in America."). *See also* D. HAPGOOD, *supra* note 65 at 9 ("The career market is closing its doors to those without degrees.").

72. Diplomas are screening devices for personnel officers who need "something to cut the sheer numbers [of job applicants] down . . . ." I. BERG, *supra* note 65, at 78.

73. Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1123 (1973).

school is a child's "work." Regular promotion and progression from grade to grade create legitimate expectations not dissimilar from those held by adult workers who receive raises or increased job status according to a schedule.[74] The current furor about "social promotions"[75] should not obscure the fact that students do fail academically and many are retained at grade level.[76] Promotions are not automatic and the expectations engendered by them should not be totally discounted. Graduation and the receipt of a diploma are the natural culminating events of a high school career.[77] Anticipation of these events may bear heavily on a student's decision to remain in school after he or she has passed the age of compulsory attendance. The promise of a diploma and its appurtenant benefits thus can motivate students to complete high school, particularly if they receive arguably positive reinforcement in the form of annual promotions based on their teachers' evaluations of their performance. The diploma should be viewed as a major benefit accruing to those who have met the traditional conditions of their "employment"—regular attendance and passing grades.

b. *Liberty Interest in Personal Reputation*

The *Debra P.* court repeatedly acknowledged "a very serious problem"[78] in the likelihood that students who failed the FLE would be stigmatized because "the term 'functional illiterate' has a universally negative inference and connotation. While '*illiteracy*' is itself a negative and impact ladened word, '*functional illiteracy*' further compounds these implications by focusing on the individual's inability to operate effectively in society."[79] At another point in the opinion, the court, citing *Wisconsin v.*

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74. The legitimacy of expectations was the distinguishing feature between Board of Regents v. Roth, 408 U.S. 564 (1972) and its companion case, Perry v. Sindermann, 408 U.S. 593 (1972). The plaintiff in *Roth*, a first year teacher who had a one year contract, was held not to have had a protected property interest in continued employment. In *Perry*, the plaintiff-teacher was held to have had a protected interest in continued employment because his ten years of prior service gave rise to protected rights under the school's informal tenure system. The *Debra P.* opinion punctuated the expectative interest: "Graduation is the logical extension of successful attendance." 274 F. Supp. at 266.

75. This furor about social promotions should not obscure two points. First, social promotion is venerable. It appears in the most famous of American educations: "In the one branch he [Adams] most needed—mathematics—barring the first few scholars, failure was so nearly universal that no attempt at grading could have had value, and whether he stood fortieth or ninetieth must have been an accident or the personal favor of the professor." H. ADAMS, THE EDUCATION OF HENRY ADAMS 60 (1918). Social promotion was utilized as a cost-cutting measure in the heyday of scientific educational management some sixty years ago. *See* R. CALLAHAN, EDUCATION AND THE CULT OF EFFICIENCY 166 (1962). Second, the research on social promotion, which has been conducted at various times during the last seventy years, indicates that retention at grade level is generally less educationally efficacious than a promotion. This research is summarized in Cawelti, *supra* note 11, at 621.

76. "The classroom teacher . . . *annually flunks more than one million students.*" Cawelti, *supra* note 11, at 620 (emphasis in original).

77. *See* note 74 *supra*.

78. 474 F. Supp. at 249.

79. *Id.* at 258 (emphasis in original).

Constantineau,[80] stated that "the plaintiffs ha[d] a liberty interest in being free of the adverse stigma associated with the certificate of completion."[81] *Constantineau* struck down a state statute that called for "posting", without notice or a hearing, the names of known "excessive drinkers" in establishments selling liquor. The court held that "where the State attaches 'a badge of infamy' to the citizen, due process comes into play."[82] *Paul v. Davis*,[83] in upholding the distribution of "known shoplifter" lists containing the names of unconvicted persons, cut back on the broadly defined reputation interest enunciated in *Constantineau*. *Paul* distinguished the earlier case on the basis that *Constantineau* concerned an "alteration in legal status."[84] *Paul* held that due process protection of a liberty interest in one's good name would attach only when the stigma amounted to a change in status. Even under the more restrictive *Paul* test the Florida students' interest should be protected. Not only is their reputation besmirched by the stigmatizing epithet "functional illiterate" but also a change in status results from receiving a certificate of completion instead of a standard diploma because certificate holders would be ineligible for certain categories of state employment and admission to state universities.[85]

The fact that the names of certificate recipients would not be publicly disclosed in a formal manner would not substantially diminish the degree of stigmatization. The "grapevine" in an American high school permits few secrets; it is naive to hope that certificate holders would be able to remain anonymous. More importantly, the certificated student would have to reveal his status whenever it really mattered to him, as when applying for a job or seeking additional education.[86] Thus, absence of a formal publication should not impede finding that a stigma results from the certificate of completion under *Constantineau* or *Paul*.

2. *Academic Evaluations and Due Process*

a. *The Traditional View*

While courts have been slow to intervene in the affairs of schools generally,[87] they have been extraordinarily reluctant to become embroiled

80. 400 U.S. 433 (1971).

81. 274 F. Supp. at 266.

82. 400 U.S. at 437.

83. 424 U.S. 693 (1976).

84. *Id.* at 708.

85. *See* text accompanying note 40 *supra*.

86. The cases that have upheld the firing of public employees without a hearing have stressed that the individual was "as free as before" to seek another job. Board of Regents v. Roth, 408 U.S. 564, 575 (1972); Bishop v. Wood, 426 U.S. 341, 348 (1976) (quoting *Roth*). The certificate holder, in contrast, would be locked out of certain opportunities. *See* text accompanying note 40 *supra*.

87. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities." Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

in academic performance controversies particularly.[88] The customary response has been to show great deference to the expertise of educational decisionmakers unless the challenged decision is clearly arbitrary or capricious. Although most of the recent litigation contesting evaluations of scholastic performance has been instigated by graduate or professional students, there are some older cases that consider evaluations of academic performance at the elementary and secondary school level.[89] *Barnard v. Inhabitants of Shelburne*[90] typifies the early cases that arose in the public school context. The *Barnard* court rejected the plaintiff's claim that he was wrongfully excluded from high school for his scholastic deficiences and stated:

> The care and management of schools, vested in the school committee, includes the establishment and maintenance of standards for the promotion of pupils from one grade to another and for their continuance as members of any particular class. So long as the school committee act [sic] in good faith their conduct in formulating and applying standards and making decisions touching this matter is not subject to review by any other tribunal.[91]

Most modern cases follow the arbitrary or capricious standard. *Connelly v. University of Vermont and State Agricultural College*[92] enunciated this standard in the context of the academic dismissal of a third-year medical student.

> The effect of these decisions is to give the school authorities absolute discretion in determining whether a student has been delinquent in his studies, and to place the burden on the student of showing that his dismissal was motivated by arbitrariness, capriciousness or bad faith. The reason for this rule is that in matters of scholarship, the school authorities are uniquely qualified by training and experience to judge the qualifications of a student, and efficiency of instruction depends in no small degree upon the school faculty's freedom from interference from other noneducational tribunals. It is only when the school authorities abuse this discretion that a court may interfere with their decision to dismiss a student.[93]

The following reasons have been asserted for judicial reticence:

> (1) judicial review of academic decisions would enormously encumber the administration and operation of educational institutions;
>
> (2) the specter of judicial review and adversary proceedings would subvert and perhaps poison the relationships between student and teacher and between student and school;
>
> (3) courts are largely unqualified to judge the events of specialized and subjective measures of academic performance.[94]

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88. *See* text accompanying notes 91-94 *infra*.

89. *See* Annot., 86 A.L.R. 484 (1933). *See also* Dessem, *Student Due Process Rights in Academic Dismissals from the Public Schools*, 5 J.L. & EDUC. 277 (1976).

90. 216 Mass. 19, 102 N.E. 1095 (1913).

91. *Id.* at 21, 102 N.E. at 1096.

92. 244 F. Supp. 156 (D. Vt. 1965).

93. *Id.* at 160.

94. These factors largely controlled the decision in Board of Curators v. Horowitz, 435 U.S. 78 (1978).

b. Greenhill v. Bailey: *An Exception to the Rule*

Greenhill v. Bailey[95] represents an exception to the no-intervention rule. In *Greenhill,* a medical school dismissal case, the Eighth Circuit Court of Appeals held that the plaintiff was entitled to a hearing in which he might contest his dismissal. The distinguishing feature between *Greenhill* and the general rule was that the school had "denigrate[d] Greenhill's intellectual ability, as distinguished from his performance"[96] on his record and in a letter sent to the Association of American Medical Colleges. These actions "deprived him of a significant interest in liberty, for it admittedly imposed on him a stigma."[97] The distinction between an academic dismissal standing by itself and an academic dismissal accompanied by a negative characterization of a student's overall ability is a difference in degree. The *Greenhill* holding, however, gave cognizance to the notion of an evaluation-plus, with the plus taking the form of a stigma likely to foreclose future opportunities.[98]

c. Board of Curators v. Horowitz

The Supreme Court addressed the question of due process in academic dismissals in the recent case of *Board of Curators v. Horowitz.*[99] The court held that the plaintiff-medical student, whose performance had been repeatedly evaluated by qualified medical personnel, had received all the process she was due before dismissal. The court reached out to distinguish *Goss v. Lopez.*[100] *Goss*, according to the court, dealt with school disciplinary proceedings and had "sufficient resemblance to traditional judicial and administrative factfinding to call for a 'hearing' ."[101] The *Horowitz* dispute, on the other hand, was occasioned by an academic judgment and as a result demanded "far less stringent procedural requirements."[102]

> Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement. In *Goss*, the school's decision to suspend the students rested on factual conclusions that the individual students had participated in demonstrations that had disrupted classes, attacked a police officer, or

95. 519 F.2d 5 (8th Cir. 1975).

96. *Id.* at 8.

97. *Id.*

98. The Supreme Court distinguished the *Greenhill* decision in Board of Curators v. Horowitz, 435 U.S. 78, 88 n.5.

99. 435 U.S. 78 (1978). For commentary on *Horowitz, see* Dessem, Board of Curators v. Horowitz: *Academic Versus Judicial Expertise*, 39 OHIO ST. L.J. 476 (1978); Rosenberg, *The* Horowitz *Affair*, 58 B. U. L. REV. 733 (1978); Vernon, *Due Process Flexibility in Academic Dismissals:* Horowitz *and Beyond*, 8 J.L. & EDUC. 45 (1979); Comment, Board of Curators v. Horowitz, 47 U. CINN. L. REV. 514 (1978).

100. 419 U.S. 565 (1975).

101. 435 U.S. at 88-89.

102. *Id.* at 86.

> caused physical damage to school property. The requirement of a hearing, where the student could present his side of the factual issue, could under such circumstances "provide a meaningful hedge against erroneous action." The decision to dismiss respondent, by comparison, rested on the academic judgment of school officials that she did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making.[103]

The *Debra P.* court acknowledged the Supreme Court's disciplinary/academic dichotomy but noted that "the distinction between what the rights of the two classes of individuals are is not clearly and unequivocally drawn."[104] It then distinguished *Debra P.* from *Horowitz* because of the factual differences between the two cases:

> The practical problems in *Horowitz* were manifest. Sifting through an individual student's past clinical record, rehashing physician evaluations, and litigating bedside manner were problems foreign to judicial expertise. The factual context in the instant case is very different. The Court is not asked to evaluate an individual student's performance, but to resolve a dispute involving the legislative decision to implement a test which determines graduation from high school with the standard credential, a diploma. While the factual inquiry is considerably different so are the parties. The Plaintiff in *Horowitz* was pursuing graduate education in advanced studies. The Plaintiffs in all classes in the instant case were participating in secondary education required by the state compulsory education law.[105]

Moreover, the *Debra P.* court's ruling did not jeopardize ongoing student-teacher relationships because the FLE was a machine-scored, objective, externally developed examination. Individual teachers had no discretionary authority to exercise in regard to the FLE, as opposed to the high degree of discretion necessarily exercised by the medical examiners in *Horowitz*. Nor did the moratorium on the FLE program place an administrative burden on the state because no elaborate hearing apparatus needed to be created. In short, the factors that the Supreme Court found to be controlling in *Horowitz* were largely absent or irrelevant in *Debra P.*

d. *The Need For Adequate Notice*

Although the court distinguished *Horowitz*, it did not accept the

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103. *Id.* at 89-90 (citation omitted).

104. 474 F. Supp. at 265.

105. *Id.* at 266. Differences between the parties, their level of education, and the type of certificate at issue also distinguish *Debra P.* from such cases as Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975). In *Tyler*, the plaintiffs, black applicants to the bar who had failed the Georgia bar examination, unsuccessfully challenged the constitutionality of the bar examination on equal protection grounds. Clearly, however, a license to practice law and a high school diploma are not fungible.

plaintiffs' contention that the FLE requirement was arbitrary and capricious. It did, however, find a constitutional violation in the state's implementation of the testing program. The court stated:

> The Plaintiffs, after spending ten years in schools where their attendance was compelled, were informed of a requirement concerning skills which, if taught, should have been taught in grades they had long since completed. While it is impossible to determine if all the skills were taught to all the students, it is obvious that the instruction given was not presented in an educational atmosphere directed by the existence of specific objectives and stimulated throughout the period of instruction by a diploma sanction.[106]

The court cited the case of *Mahavongsanan v. Hall*,[107] which, while upholding the decision to deny a student her masters degree for not fulfilling all requirements, implicitly acknowledged that students have a right to timely notice of major changes in the terms and conditions of their schooling.

The *Debra P.* court's use of the term "notice" substantially broadened the requirement of "timely notice"[108] alluded to in *Hall*. In *Hall*, the court of appeals held that the plaintiff, who had two weeks' notice, had been adequately notified of the pendency of a comprehensive examination.[109] In *Debra P.* the court, in finding notice to have been inadequate, observed that while "teachers were aware of the objectives of the functional literacy examination four months in advance of the first administration . . . only two months were available for instruction in the application of the skills."[110] The court read "notice" to mean more than merely apprising Florida students of the imminence and importance of the FLE. Adequate notice required that the students be made aware of their own scholastic deficiencies and given appropriate instruction *before* being subjected to the FLE. The type of notice envisaged by the court was designed to make students aware of the state objectives and to provide educators with sufficient time to develop FLE-based instructional strategies. The court stated:

> The principal problem with the instant program is that the instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction. Instruction of the skills necessary to successfully complete the functional literacy test is a cumulative and time consuming process. Knowledge of how to successfully perform the functional literacy skills is not taught in any specific grade, in any specific class, or from any specific type of teacher. It is critical that at the time of instruction of a functional literacy skill, the student knows that the individual skill he is being taught must be learned prior to his graduation from a Florida public school. Instruction in the specific skills is critical, but likewise so is

106. *Id.* at 267.
107. 529 F.2d 448 (5th Cir. 1976).
108. *Id.* at 450.
109. 529 F.2d 448, 450 (5th Cir. 1976), *reversing* 401 F. Supp. 381, 383 (N.D. Ga. 1975).
110. 474 F. Supp. at 263.

> identification of whether the skills have been learned. Teaching and learning are not always coterminous. . . . Until recently, there was no state wide testing program to evaluate learning and to direct remediation.[111]

This expansive concept of notice, while novel, seemed appropriate in the factual context presented by *Debra P.* A new set of educational objectives, energized by the FLE and the diploma sanction, had been adopted in considerable haste. There was serious doubt regarding whether the requisite skills were taught "recently, well or perhaps at all"[112] to many pupils. Thus, on the due process notice issue the court agreed with a knowledgeable commentator who stated that "whatever notice is considered adequate for the competency testing requirement, notice after most of one's educational program is already completed seems clearly inadequate."[113]

B. *Equal Protection*

1. *The Standards of Review*

Traditionally, equal protection analysis has been structured in a two-tiered system in which a rational basis test is applied in cases not involving fundamental rights[114] or suspect classifications,[115] and a strict scrutiny test is applied when fundamental rights or suspect classifications, of which race is the paradigm, are at issue. The test of rationality subjects the challenged decision to a minimal level of review while strict scrutiny is almost always "fatal in fact."[116] The court in *Debra P.* was faced with the issue whether the classifications created by the FLE requirement were racially based or whether the test merely created the nonsuspect categories of passers and failers.

The court found that the classifications created by the FLE requirement were invidious to the extent they perpetuated past racially discriminatory practices and hence strict scrutiny was applicable. It then pinpointed the precise point in time when the classifications would be transformed into the non-invidious categories of passers and failers, whereupon the test of rationality would become the proper standard of review. The state would thereafter be free to reinstitute its testing program with the diploma sanction.[117]

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111. *Id.* at 264 (citation omitted).

112. *Id.* at 265.

113. McClung, *supra* note 3, at 682.

114. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate). Education is not a fundamental right. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35-37 (1978).

115. Classifications based on race or ancestry are suspect. *See, e.g.*, Strauder v. West Virginia, 100 U.S. 303 (1880) (race).

116. Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (racial classification upheld).

117. 474 F. Supp. at 269.

2. *Perpetuation of Prior Official Discrimination*

Florida's prior history of racially discriminatory public education was a major factor in the court's decision to forestall the imposition of the diploma sanction. The court took judicial notice of the dual school system operated by the state from 1885 to 1967 and determined from testimony that Florida's schools remained segregated from 1967 to 1971, the plaintiffs' first four years in school.[118] The court therefore concluded that the Florida public schools were not physically integrated until the 1971-72 school year.[119] This historical background was held to be similar to that of *Gaston County v. United States*,[120] a case which, although decided on statutory grounds,[121] exemplifies the perpetuation doctrine. *Gaston* invalidated a racially neutral literacy test to determine voter eligibility because, in light of North Carolina's prior history of complete educational segregation, "[i]mpartial administration of the literacy test today would serve only to perpetuate these [past] inequities in a different form."[122] The perpetuation doctrine posits that ostensibly neutral government acts cannot reinforce past constitutional violations.

The court then looked to cases that have considered perpetuation in the context of public education. These cases deal respectively with desegregation and ability grouping. Desegregation cases were cited for the proposition, recently reiterated in *Columbus Board of Education v. Penick*[123] and *Dayton Board of Education v. Brinkman*,[124] that school authorities are charged with an affirmative duty to remedy the ongoing effects of past purposeful discrimination.

The ability grouping cases[125] served as an example of how ostensibly neutral educational practices, including standardized testing, can perpetuate past constitutional violations in recently desegregated districts. "Ability grouping is the practice of arranging groups of students in different sections or classrooms within a grade and assigning different

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118. *Id.* at 250-51.

119. *Id.* at 252.

120. 395 U.S. 285 (1969); *See also* Griggs v. Duke Power, 401 U.S. 424 (1971) (intelligence test as job requirement).

121. The case was brought under The Voting Rights Act of 1965. 42 U.S.C. §§ 1971, 1973-1973p (1976).

122. 395 U.S. at 297.

123. 443 U.S. 449 (1979).

124. 443 U.S. 526 (1979).

125. *E.g.*, McNeal v. Tate County School Dist., 508 F.2d 1017 (5th Cir. 1975); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc). United States v. Tunica County School Dist., 421 F. 2d 1236 (5th Cir. 1970); Singleton v. Jackson Mun. Sep. School Dist., 419 F.2d 1211 (5th Cir. 1970); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. La. 1971); *See also* R. MILLS & M. BRYAN, TESTING . . . GROUPING: THE NEW SEGREGATION IN SOUTHERN SCHOOLS (1976) [hereinafter cited as NEW SEGREGATION]; Shea, *An Educational Perspective of the Legality of Intelligence Testing and Ability Grouping*, 6 J.L. & EDUC. 137 (1977); Sorgen, *Testing and Tracking in Public Schools*, 24 HASTINGS L. J. 1129 (1973) [hereinafter cited as *Testing and Tracking*].

teachers to these groups."[126] It can create intraschool segregation because students who have an inferior educational background are clustered in the lower tracks.[127] Moreover, the placement mechanism, generally standardized testing, often operates to the detriment of minority pupils.[128] Several cases have proscribed[129] or delayed[130] these homogenous grouping schemes.

The ability grouping cases were also important because they provided a standard of review by analogy. The analogy was apt because Florida's FLE requirement can be characterized as out-the-door ability grouping. The court quoted the test developed by the Fifth Circuit in *McNeal v. Tate*:[131]

> The testing rationale of both *Singleton* [*v. Jackson Mun. Sep. School Dist.*[132]], and *Lemon* [*v. Bossier Parish School Bd.*,[133]] would bar the use of this method of assignment until the district has operated as a unitary system without such assignments for a sufficient period of time to assure that the underachievement of the slower groups is not due to yesterday's educational disparities. Such a bar period may be lifted when the district can show that steps taken to bring disadvantaged students to peer status have ended the educational disadvantages caused by prior segregation.[134]

The remedy in *Debra P.* included a "bar period" similar to *McNeal*. Lifting of the bar period, however, seemed to be based at least in part on factors other than those expressly stated in *McNeal*. While *McNeal* looked to the "steps taken to bring disadvantaged students to peer status," the court in *Debra P.* linked the bar period to the date when segregation in Florida's schools had ended.[135]

3. *The Effect of Pre-1971 Violations of Equal Protection*

The *Debra P.* court cited *Green v. County School Board of New Kent County*[136] for the proposition that "not only was it necessary to eliminate

126. NEW SEGREGATION, *supra* note 125, at 2. The practice is widespread in the South. *Id.* at 46-47.

127. *See, e.g.*, Moses v. Washington Parish School Bd., 330 F. Supp. 1340, 1343 (E.D. La. 1971) (the lowest tracks were comprised entirely of black students in the challenged grouping plan); Hobson v. Hansen, 269 F. Supp. 401, 511-14 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc) (which detailed the operations of the Washington, D.C. ability grouping scheme. The plan severely curtailed the educational opportunities of black pupils). Ability grouping tends to be self-fulfilling because, not surprisingly, those who are taught less learn less. McNeal v. Tate County School Dist., 508 F.2d 1017, 1020 (5th Cir. 1975).

128. Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc), provided a dramatic example. When school personnel employed evaluative techniques other than standardized tests, they learned that two-thirds of the re-evaluated students would have been placed erroneously in the lowest track. 269 F. Supp. at 490.

129. *Id.* at 515 (track system "abolished").

130. *See, e.g.*, McNeal v. Tate County School Dist., 508 F.2d 1017 (5th Cir. 1975).

131. *Id.*

132. 419 F.2d 1211 (5th Cir. 1969).

133. 444 F.2d 1400 (5th Cir. 1971).

134. 508 F.2d at 1020-21.

135. *See* text accompanying notes 139-42 *infra*.

136. 391 U.S. 430 (1968).

physical segregation of public schools, but it was also necessary to eliminate the effects of such purposeful discrimination."[137] The court then noted that "the principal effect of the dual school system was the inferior education given black school children."[138] Thus, while Florida's schools had been physically integrated since 1971, the learning deficits created during the dual school period had not been overcome, notwithstanding the post-1977 remedial efforts. The court's analysis placed pivotal significance on 1971, the first year of integrated schooling in Florida.

The fact that the plaintiffs were denied equal protection in the pre-1971 period by virtue of their enrollment in segregated schools shifted the burden to the state to show that the prior discrimination was not the cause of the disproportionate FLE failure rate. The court found that the "[d]efendants . . . failed to rebut the fact that the disproportionate failure of [black students] resulted from the inferior education they received during the dual school system portion of their education."[139] Whether the state defendants could have rebutted the claim that the high black failure rate and prior official discrimination were causally related is questionable in light of other language in the opinion. The court stated: "When students regardless of race are permitted to *commence* and pursue their education in a unitary school system without taint of the dual school system, then a graduation requirement based on a neutral test will be permitted."[140] If students must "commence and pursue their education in a unitary school system" before a test-based graduation requirement may be imposed, then the fact that students attended an unconstitutional dual school system for any length of time appears to control.

In the event of subsequent cases challenging MCT programs, however, particularly in school districts that have been required to desegregate within the last several years, the opportunity to show effective affirmative action to correct the effects of past segregation may be significant. The alternative, requiring students to *commence* their education in a unitary system, would delay implementation of MCT as a graduation requirement for a decade or more in many districts.[141] The latter approach, making the bar period coincide with the length of time required to filter all the victims of prior constitutional violations through the system, simplifies the judicial task. Using the date of integration as a date of demarcation frees the court from having to determine the efficacy of remedial and compensatory programs. On the other hand, a "commence and pursue" requirement necessarily burdens recently desegregated school districts that contem-

137. 474 F. Supp. at 256.

138. *Id.*

139. *Id.* at 256.

140. *Id.* at 257 (emphasis added).

141. If Ohio, for example, were to implement an FLE-type graduation requirement, under a commence and pursue standard, it would have to wait until 1992 to put the program into effect statewide because several of the state's largest school districts, including Cleveland, Columbus, Dayton, did not desegregate their schools until the 1979-80 school year.

plate the imposition of an FLE-type graduation requirement. The overriding considerations in *Debra P.*, however, were the court's "serious reservations about attaching a constitutional imprimatur to a program which penalizes students who have been denied equal opportunity."[142] The court then sharply distinguished the situation of post-1971 enrollees.

4. *The Post-1971 Period: Present Intent to Discriminate*

a. *The Intent Conundrum*

A formerly vexing question in equal protection cases was whether discrimination was to be measured by purpose or effect or some combination of the two. The *Debra P.* court relied on a series of Supreme Court cases beginning with *Washington v. Davis*[143] for its conclusion that the challenged statutory scheme, although tainted by past segregation, did not manifest present intent to discriminate. Since *Washington*, which denied the claims of black applicants who challenged an allegedly discriminatory employment test administered by the District of Columbia, subjective intent has been the dominant factor in the purpose/effect dichotomy. Accordingly, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[144] As for discriminatory effect, the *Washington* Court stated that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution."[145]

The court further developed the *Washington* doctrine in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[146] a case challenging an allegedly racially discriminatory zoning decision that blocked construction of an integrated housing project. *Arlington Heights* enunciated "subjects of proper inquiry in determining whether racially discriminatory intent existed."[147] These subjects included (1) a disproportionate impact ("an important starting point"[148]); (2) the historical setting; (3) the specific events surrounding the challenged action; (4) departures from normal procedures; and (5) contemporaneous public statements by the decisionmakers.[149] The Court also indicated that finding an impermissible purpose might not operate to invalidate the challenged decision and thereby end the inquiry. Instead, proof of a discriminatory purpose would "have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been

142. 474 F. Supp. at 256.
143. 426 U.S. 229 (1976).
144. *Id.* at 240.
145. *Id.* at 242.
146. 429 U.S. 252 (1977).
147. *Id.* at 268.
148. *Id.* at 266.
149. *Id.* at 266-68.

considered."[150] This burden shifting device made a plaintiff's task more formidable because once an impermissible purpose to discriminate was demonstrated, the defendant could rebut by showing that the intended discrimination was not a "but-for" factor in the decisionmaker's deliberations.

After *Washington*, a number of courts of appeal had approached the purpose/effect question by a "natural, probable, and foreseeable" test.[151] This "objective standard" viewed the challenged decision in terms of its foreseeable consequences. Using this test, if the natural, foreseeable result of a government policy had demonstrably more severe effects on minorities, a presumption of discriminatory purpose arose which the defendant could rebut by showing that the decision was not racially motivated or that the same decision would have been reached in the absence of the improper purpose. However, as one commentator has noted:

> This "foreseeability" structure of inquiry into motivation conflicts with the structure designed by the Supreme Court in *Arlington Heights*. The disproportionate racial impact of virtually every facially neutral decision disproportionately disadvantaging nonwhites is "natural and foreseeable," and thus the former structure displaces the latter. The principal practical difference between the two structures concerns the burden of proving race-dependency: under *Arlington Heights* the challenging party must show that racial considerations were a motivating factor; under the foreseeability structure the challenging party need show only what will virtually always be obvious anyway—that the disproportionate disadvantage suffered by nonwhites is the natural and foreseeable consequence of the facially neutral decision—in order to shift to the defendant the burden of proving that racial considerations were not a but-for cause of the challenged decision.[152]

Thus, to the extent the "foreseeability" test is a disproportionate racial impact test in another guise, it is out of harmony with *Washington* and *Arlington Heights*.

The Court spoke on the proper role of foreseeability in *Personnel Administrator v. Feeney*:[153]

> "Discriminatory purpose," however, implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of", not merely "in spite of," its adverse effects upon an identifiable group.[154]

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150. *Id.* at 270-71 n.21.

151. *See, e.g.*, Arthur v. Nyquist, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978); United States v. Texas Educ. Agency, 564 F.2d 162 (5th Cir. 1977); United States v. School Dist., 521 F.2d 530 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); Morgan v. Kerrigan, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); Oliver v. Michigan State Bd. of Educ., 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); United States v. Board of School Comm'rs, 474 F.2d 81 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

152. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1038 (1979).

153. 442 U.S. 256 (1979).

154. *Id.* at 279 (citation omitted). *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 526, 536 n.9 (1979).

Feeney's "because of" test does for objective intent what *Arlington Heights* did for subjective intent. Foreseeability is not enough to show invidious intent just as disproportionate impact and a non-but-for discriminatory purpose are insufficient to trigger an equal protection violation. *Feeney*, however, while narrowing the role of foreseeability, did not foreclose the use of objective criteria altogether. In a footnote, the Court in *Feeney* stated that "this is not to say that the inevitability or foreseeability of consequences of a neutral rule has no bearing on the existence of discriminatory intent."[155]

b. *Intent in* Debra P.

The *Debra P.* court applied the *Feeney* "because of" test and found no present intent to discriminate because it had insufficient proof "that the motivation for implementing the program was in *Feeney* terms 'because of' the large black failure statistics."[156] *Feeney,* however, cited *Washington v. Davis* for the proposition that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[157] Consideration of the totality of the circumstances in *Debra P.* was limited to finding that the state had "a legitimate interest in implementing a test to evaluate the established statewide objectives."[158]

In *Feeney*, the Court attributed particular significance to the fact that the Massachusetts veteran's preference dated back almost a century and found no present intent to discriminate. In *Debra P.*, by contrast, the court was confronted with a new, unproved program that contemplated rigorous sanctions never before imposed. Although the court chronicled Florida's history of segregated public schooling, and acknowledged the recalcitrance with which integration was accepted, it did not link the challenged statutory scheme causally with the integration of Florida's schools.[159] A finding of present intent might have resulted if the court had considered desegregation and minimum competency testing as significant and intertwined threads in the whole cloth of Florida public education.

c. Debra P. *Compared to* Riles

It is instructive to compare the *Debra P.* court's finding of no present intent to discriminate with the intent analysis in the recent California federal district court case of *Larry P. v. Riles.*[160] *Riles* enjoined on

155. 442 U.S. at 279 n.25.

156. 474 F. Supp. at 254.

157. 426 U.S. at 242.

158. 474 F. Supp. at 254.

159. "Some black parents in desegregated communities see a racial motive behind competency testing. They say that competency testing was not a concern at either black or white schools until the schools in their district were desegregated, at which time competency testing was introduced to protect standards." McClung, *supra* note 3, at 688. Rep. Shirley Chisholm, New York, has stated that "[i]t is no accident that black students fail at a much higher rate than whites." Columbus Dispatch, Feb. 18, 1980 at C-8, Col. 4.

160. No. C-71-2270 R.F.P. (N.D. Cal. Oct. 16, 1979) *appeal docketed* No. 80-4027 (9th Cir. Jan. 17, 1980), *summarized at* 48 U.S.L.W. 2298 (Oct. 30, 1979). *Riles* has a lengthy procedural history. *See*

statutory and constitutional grounds the use of standardized intelligence (IQ) tests as a criterion for placing pupils in classes for the educable mentally retarded (EMR). While *Riles* might have rested on the statutory claims,[161] the court felt it "inappropriate"[162] not to discuss the constitutional ramifications. The *Riles* court reprised the *Washington*, *Arlington Heights*, and *Feeney* holdings and the ever-narrowing standard of invidious intent that these cases established.[163] It nevertheless determined that strict scrutiny was the proper standard after subjecting the *Riles* facts to an analysis based on the factors enumerated in *Arlington Heights*. This analysis revealed the following:

> Admittedly a number of reasons can explain a lack of attention to a problem such as that of disproportionate enrollment, but the clear pattern cannot be ignored. The facts permit but one inference, and the state has not offered evidence that permits any other inference. Despite the admitted problems with the I.Q. tests, and despite disproportionate enrollments which had even been condemned by the legislature, the [State Department of Education's] actions revealed a complacent acceptance of those disproportions, and that complacency was evidently built on easy but unsubstantiated assumptions about the incidence of retardation or at least low intelligence among black children. Coupled with the affirmative decision to adopt the requirement of particular I.Q. tests in 1969, that complacent acceptance must be seen as a desire to perpetuate the segregation of minorities in inferior, dead end, and stigmatizing classes for the retarded.[164]

Applying the *Riles* analysis to *Debra P.*, the "complacent acceptance" of the disproportionate failure rate was, to paraphrase, evidently built on easy assumptions about the incidence of low achievement among black children.[165] The segregative intent in *Debra P.* was not necessarily to hurt black children, but it was an intent to designate a grossly disproportionate number of black children as functional illiterates when the preliminary screening of the FLE indicated that a high percentage of black students would not pass the test.[166] The distinguishing features of the two cases—IQ

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343 F. Supp. 1306 (N.D. Cal. 1972), *aff'd*, 502 F.2d 963 (9th Cir. 1974) (temporary injunction on intelligence testing for special class placement).

161. The claims were predicated on the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401-1461 (1976).

162. No. C-71-2270 R.F.P., slip op. at 75.

163. *Id.* at 75-92.

164. *Id.* at 91-92.

165. *E.g.*, "One official of the State Department of Education estimated that the failure rate among Black students would eventually exceed 75 percent of those taking the test. He said that this state of affairs did not come as a surprise to him since he expected in all cases a high failure rate among Blacks. . . . The state testing director suggested that Blacks traditionally score lower than Whites on achievement tests and the Florida Literacy Test was not expected to provide an exceptional case."
NEA REPORT, *supra* note 3, at 11.

166. *Cf.* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After* Feeney, 79 COLUM. L. REV. 1376 (1979) [hereinafter cited as *Assessment After Feeney*]:
> The plaintiffs in Feeney conceded that the law had a legitimate purpose: aiding veterans. This, of course, suggests that the legislature would have passed a veterans' preference law even if it did not have an adverse impact on women; thus, it can in no way be said that the veterans' preference law would have been enacted *only* if it had an adverse impact. But it is entirely

tests as opposed to the FLE[167] and the use of test results for special class placement rather than as a graduation requirement—do not negate their commonality. The central factor in both cases was the affirmative decision to use standardized tests instrumentally in a manner that disproportionately and foreseeably burdened minority students and limited subsequent educational and employment opportunities. The differing results in terms of present intent to discriminate in *Debra P.* and *Riles* illustrate the interpretative difficulties created by the recent Supreme Court pronouncements on discriminatory intent.[168]

d. *Passers and Failers*

The plaintiffs in *Debra P.* mounted a full-scale attack on the FLE claiming that the test "ha[d] not been properly validated for administration to racial or ethnic minorities,"[169] that it was not "related to the curriculum or instruction with which . . . the plaintiffs ha[d] been provided,"[170] that the cutoff score had been arbitrarily determined,[171] and that "individual items . . . [were] less likely to be answered correctly by black students than by whites."[172] The court largely rejected these claims but not before it had received "an education in 'state of the art' educational measurement and testing."[173] This "education" revealed a number of psychometric flaws in the Florida test. These flaws, however, were relegated to the following footnote:

> Among the flaws asserted and considered were: the failure of DOE to solicit public input into the design of the test and its definition; the drafting of item specifications after the writing of items; the continual use by DOE of definitions of functional literacy extraneous and inconsistent with the official definition; the inadequacy of the research prior to the selection of a cut-score; the questionable research methodology of the Defendants' construct validity study; the failure to follow the APA standards for the design and implementation of tests which affect the lives of the takers in a significant fashion; the failure of DOE to adequately publicize what the test is and its inherent limitations; the inadequacy of the form notice sent to parents and students regarding the interpretations of scores on the test; the reliability of the test. While some of the above mentioned flaws were indeed errors of

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consistent with this analysis to conclude further that the legislature would not have enacted a preference with such a devastating effect on women unless it held the view that it was unimportant for women to have an opportunity for meaningful employment.

Id. at 1398.

167. "There is no clear line between the skills measured by standard IQ tests and the skills measured by tests of verbal and nonverbal ability." C. JENCKS, INEQUALITY 57 (1972).

168. *Cf. Assessment After Feeney*, *supra* note 166, at 1377 ("discriminatory purpose continues to be both a controversial facet of constituional law and a standard that has been inconsistently applied in the lower courts") (footnotes omitted).

169. Complaint at 14.

170. *Id.*

171. *Id.*

172. *Id.*

173. 474 F. Supp. at 261.

considerable magnitude, they do not cross either individually or collectively the line between inadequacy and constitutional infirmity.[174]

Notwithstanding these flaws, the court limited its analysis of the test to the question whether the "test utilized was a valid and reasonable measure for dividing students into classifications for the purpose of high school graduation."[175] It analogized its approach to Title VII testing standards and cited *Griggs v. Duke Power*[176] and *Armstead v. Starkville Municipal Separate School District.*[177] *Griggs,* a Supreme Court case decided on title VII[178] grounds, held that a non-job related employment test and diploma requirement were invalid because they served to exclude black workers. The challenged criteria lacked a "manifest relationship"[179] to the job and thus could not be used. *Armstead* was decided on constitutional grounds and held that conclusive use of a cutoff score on the Graduate Record Examination (GRE) for purposes of hiring and retaining teachers was irrational and hence a violation of the equal protection clause.[180] While *Griggs* and *Armstead* matched the challenged test to a particular job, *Debra P.* matched the test to the state objectives and the state-prescribed definition of functional literacy.[181] Applying the equal

174. *Id.* at 261 n.23.

175. *Id.* at 260. The court looked to the APA STANDARDS, *supra* note 29, to assess whether the FLE had adequate content and construct validity. Content validity exists if a test measures what it is designed to measure. "To demonstrate the content validity of a set of test scores, one must show that the behaviors demonstrated in testing constitute a representative sample of behaviors to be exhibited in a desired performance domain." *Id.* at 28. Construct validity exists if the test is consistent with its underlying construct, "a theoretical idea developed to explain and to organize some aspects of existing knowledge." *Id.* at 29. The court determined that the FLE was consistent with the state objectives (content) and the state's official definition of functional literacy (construct). The court acknowledged that there were at least eleven other definitions of functional literacy but limited its validity inquiry to the state's definition: "[F]unctional literacy is the satisfactory application of basic skills in reading, writing and arithmetic, to problems and tasks of a practical nature as encountered in everyday life." 474 F. Supp. at 258. The court did not rule on the FLE's predictive validity, *see* A.P.A. at 39, or its concurrent validity, that is, how well the FLE correlated with other measures of school performance. *See id.*

176. 401 U.S. 424 (1971).

177. 461 F.2d. 276 (5th Cir. 1972).

178. Civil Rights Act of 1964, 42 U.S.C. §§2000e-2000e(17) (1976).

179. 401 U.S. at 432. *Griggs* illustrates Berg's thesis, *supra* note 65, that educational requirements for most jobs serve primarily to narrow the applicant pool notwithstanding the reasonable but, according to Berg, unsubstantiated belief of employers that better educated workers are necessarily better workers. The Court in *Griggs* expressed its disapproval of this type of credentialism:

> The facts of this case demonstrate the inadequacy of broad and general testing devices as well as the infirmity of using diplomas or degrees as fixed measures of capability. History is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the commonsense proposition that they are not to become masters of reality.

401 U.S. at 433.

180. *But see* United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd mem.*, 434 U.S. 1026 (1978) (use of National Teachers Examination (N.T.E.) as criterion for teacher certification and promotion upheld). The *South Carolina* judgment countered earlier cases disallowing the N.T.E. as a job requirement, *e.g.*, United States v. North Carolina, 400 F. Supp. 343 (E.D.N.C. 1975), *vacated*, 425 F. Supp. 789 (E.D.N.C. 1977).

181. 474 F. Supp. at 260.

protection rational relation test, (not a "manifest relation" test) the court found that the FLE bore "a rational relation to a valid state interest."[182]

III. AN ALTERNATIVE APPROACH

Donald Lewis suggests[183] that questions of test validity and suitability should be analyzed in due process terms when life-shaping decisions are based on test results.

> The inquiry under the equal protection clause asks only whether there is a rational relationship between the testing device which creates the challenged classifications, and a legitimate state purpose. The nature of the judicial task differs under the due process clause, which requires the state to implement procedures designed to minimize erroneous deprivations of private interests in property and liberty. A standard of test validation sufficient to show a rational relationship to the substance of state law may still be too weak to serve as an adequate procedural mechanism to ensure the accuracy demanded by the due process clause as construed in *Eldridge*.[184]

He cites the utilitarian standard of *Matthews v. Eldridge*[185] as a model. The *Eldridge* test balances these factors:

> First the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[186]

The *Eldridge* formula can be applied to *Debra P.* First, the private interests affected by the official action were substantial in that future opportunities and personal reputations were jeopardized.[187] Second, the risk of erroneous deprivation, although mitigated somewhat by the retake process and remediation, was greater than it might have been if the program did not rely exclusively on a single mode of evaluation. In other contexts reliance on test scores as the sole basis for life-shaping decisions has been proscribed. The reasons for the proscription are illustrated by this

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182. *Id.* at 261. The court's inquiry into the cultural bias of the test was also low level. The court determined that there was no unconstitutional bias in the test questions. *Id.* at 261-62.
The court's *Griggs* discussion may ultimately be a source of confusion. Notwithstanding the reference to *Griggs*, the court did not apply the stringent Title VII testing standards, 29 C.F.R. § 1607. If, however, employers subsequently base hiring decisions on the FLE, then the test might qualify as an employment test subject to Title VII standards and the employers' failure to comply with these standards may create liability under the statute. *See, e.g.*, Equal Employment Opportunity Comm. Decision No. 71-2229, 4 Fair Empl. Prac. Cas. 249 (1971) (policy of awarding job placement points on basis of grades in certain high school courses violates Title VII employment testing rules).

183. Lewis, *Certifying Functional Illiteracy: Competency Testing and Implications for Due Process and Equal Education Opportunity*, 8 J.L. & EDUC. 145 (1979).

184. *Id.* at 161 n.117.

185. 424 U.S. 319 (1976).

186. *Id.* at 335. Justice Marshall stated that an *Eldridge*-type inquiry should have been utilized in *Horowitz*, 435 U.S. at 97-108 (Marshall, J., concurring and dissenting).

187. *See* text accompanying notes 65-86 *supra*.

excerpt from the legislative history of the Education for All Handicapped Children Act of 1975:[188]

> The Committee is alarmed about the abuses which occur in the testing and evaluation of children, and is concerned that expertise in the proper use of testing and evaluation procedures falls far short of the prolific use and development of testing and evaluation tools. The usefulness and mechanistic ease of testing should not become so paramount in the educational process that the negative effects of such testing are overlooked.[189]

The regulations promulgated under the Act specify that no single test or procedure should be used as the sole criterion for placement.[190] This rationale for multicriteria evaluations does not lose its force when applied to the vast majority of pupils who are not handicapped. Moreover, multicriteria evaluations serve the state's asserted interest in upgrading student achievement without incurring additional fiscal and administrative burdens.

The advantage of this approach is that it values accuracy over expediency when a significant interest is at stake. If the *Debra P.* court had utilized the *Eldridge* procedural due process analysis, the various flaws in the Florida testing scheme, which "were indeed errors of considerable magnitude,"[191] might have risen to the level of a constitutional violation not only because pretest notice was inadequate but because the FLE program was riddled with educational and psychometric irregularities.

Another reason for holding educational testing to higher standards of accuracy than employment testing is that while the primary purpose of an employer's enterprise is to produce a product or provide a service to which end employment testing is but an incidental function, a primary purpose of contemporary schooling is to evaluate, to sort and select students in a manner that encourages each individual student to exploit his or her ability to the fullest.[192] The waste of human potential is the necessary consequence of miscalculations in the educational sorting process.[193] This consequence is sufficiently undesirable as to require decisionmaking procedures that minimize the likelihood of error.

The public schools, which were originally designed to serve a declassificatory function, have emerged as America's principal social sorting institution.[194] For a long while the schools rejected the role of social

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188. 20 U.S.C. §§ 1401-1461 (1976).

189. 3[1975] U.S. CODE CONG. & AD NEWS 1453; *Cf.* APA, *supra* note 29, at 72-73.

190. 45 C.F.R. § 121a.532d (1979).

191. 474 F. Supp. at 261 n.23.

192. *See* Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classifications*, 121 U. PA. L. REV. 705 (1973). *Cf.* Larry P. v. Riles, No. C-71-2270 R.F.P. (N.D. Cal. Oct. 16, 1979) (employment and educational testing contrasted).

193. *See* Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc).

194. *See* J. SPRING, THE SORTING MACHINE: NATIONAL EDUCATIONAL POLICY SINCE 1945 (1976).

sifting mechanisms.[195] This lofty stance, however, gave way to an acknowledgment of the sorting out function that schools had always performed. The *NEA Report* addressed this point and noted the change in the nature of this sorting process in recent decades:

> In the past the schools sorted their students, giving failing grades to those who had difficulty in learning and encouraging those who learned easily. And while most of the other students went on to graduate from high school, those who received low grades soon dropped out and found jobs requiring little education. This practice is no longer acceptable in a technological nation. Those who drop out are largely unemployable and live on welfare funds. Hence, young people are urged to stay in school and the school is expected to find ways of teaching those who do not respond to traditional educational practices. This is a new task for American schools and most of them need assistance in learning how to effectively teach children who in the past have not learned easily. Against this background the panel has studied the Accountability Act and particularly the Florida Program of Minimum Competency Testing, seeking to evaluate its impact on students, parents, teachers, and the local schools.[196]

School classifications, moreover, have become ever more fine as a result of an expanded educational and institutional framework and the disparate needs of a technologically and sociologically complex society.[197] In short, it is difficult to overemphasize the imperativeness of accuracy in the life-shaping decisions made by school officials. Thus, as a matter of procedural due process, if not equal protection, sound test instruments and sound testing practices must support important school classifications that are likely to affect dramatically the direction and scope of students' future endeavors.

IV. CONCLUSION

Debra P. places two burdens on MCT programs: first, school districts that plan to link the diploma with a passing score on a competency test must give students adequate notice, with notice expansively defined to include notification, diagnosis of scholastic deficiencies, and pre- and post-test remediation. Second, school districts with a prior history of purposeful discrimination may not use the diploma sanction in a way that compounds past constitutional violations.

It is important to note that both of these judicial constraints relate principally to matters of timing. Neither the FLE itself nor the reliance on standardized testing as a conclusive mode of evaluation were found to be constitutionally faulty notwithstanding the flaws in the test instrument and the educational unsoundness of basing a major decision on a single

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195. H. PERKINSON, THE IMPERFECT PANACEA: AMERICAN FAITH IN EDUCATION 1865-1976, 145-46 (1977).

196. NEA REPORT, *supra* note 3, at 2.

197. "The process of sorting and labeling may be required to some extent by the specialized and differentiated demands of modern society and economy." Sorgen, *supra* note 125, at 1133.

variable. It is submitted that the court should have scrutinized the test and its proposed use more vigorously because "the misuse of tests seems to be a recurrent factor in American education."[198] It is further submitted that an *Eldridge*-type inquiry would satisfy the state's desire to upgrade achievement levels while ensuring that the test instruments and procedures would be accurate and fair, thus minimizing the risk of erroneous deprivation. The gloomy experiences of minority pupils[199] in other testing contexts reiterate the need for accurate evaluative practices when significant interests are at stake.

Steven Schreiber

198. R. HOFSTADTER, *supra* note 37, at 339.

199. *See, e.g.*, Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (en banc); Larry P. v. Riles, No. C-71-2270 R.F.P. (N.D. Cal. Oct. 16, 1979); Moses v. Washington Parish School Bd., 330 F. Supp. 1340 (E.D. LA. 1971). *Cf.* DeFunis v. Odegaard, 416 U.S. 312, 335 (1974) (Douglas, J., dissenting) (LSAT disserves minorities); White, *Culturally Biased Testing and Predictive Invalidity: Putting Them on the Record*, 14 HARV. C.R. REV. 89 (1979) (cultural bias in undergraduate and professional school admission tests).